

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**ROGER DANIEL DANAHER,**

Debtor.

Case No. **03-60037-7**

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**RICHARD J. SAMSON,**

Plaintiff,

-VS-

**SUSAN M. DANAHER,**

Defendant.

Adversary Proceeding No. **05/00003**

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***MEMORANDUM OF DECISION***

At Butte in said District this 21<sup>st</sup> day of March, 2005.

In this adversary proceeding the Defendant Susan M. Danaher filed a motion to dismiss on February 7, 2005, on the grounds Plaintiff failed to plead fraud with particularity as required under F.R.B.P. 7009 (applying Fed. R. Civ. P. 9(b) in adversary proceedings). Plaintiff filed an objection on February 16, 2005, arguing that the Amended Complaint alleges fraudulent conveyance and badges of fraud with sufficient particularity. After due notice, a hearing on Defendant's motion was held at Missoula on March 10, 2005. Attorney Edward P. Nolde, of

Bigfork, Montana, represented Plaintiff. James H. Cossitt<sup>1</sup>, of Kalispell, Montana, represented Defendant. No testimony or exhibits were admitted, and at the conclusion of the hearing the Court took the Defendant's motion under advisement. After review of the pleadings and applicable law, for the reasons set forth below Defendant's motion to dismiss is denied.

Plaintiff filed a complaint on January 4, 2005, and filed an Amended Complaint on January 28, 2005, asserting jurisdiction of this Court and core proceedings to recover an alleged fraudulent transfer from transfer from Debtor to his spouse, the Defendant, of real property described as Lot 16 of Crestview Terrace, Phase 1, according to the map or plat thereof on file in the office of the Clerk and Recorder of Flathead County, Montana (hereinafter the "real property"). Amended Complaint, ¶ 10. The Amended Complaint avers that Defendant subsequently sold the real property and deposited the proceeds into a bank account in her name and used much of the net proceeds to pay her own credit card debt. ¶ 13.

Plaintiff contends in Count One: "The Debtor transferred the real estate to Defendant with the actual intent to hinder, delay or defraud Debtor's creditors and/or the Debtor received less than a reasonably equivalent value in exchange for such transfer and was insolvent on the date that such transfers were made or became insolvent as a result of such transfer." Amended Complaint, ¶ 14. Plaintiff seeks to void the transfer under 11 U.S.C. § 548 and recover the value of the transferred property, \$27,996, from the Defendant under 11 U.S.C. § 550.

In Count Two the Plaintiff repeats the factual allegations of Count One, and adds a state law claim based upon Mont. Code Ann. § 31-2-333. Paragraph 17 of the Amended Complaint

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<sup>1</sup>Cossitt has since been replaced as Defendant's attorney by Harold V. Dye, of Missoula, Montana, by Notice of Substitution filed March 16, 2005.

states: “The Debtor transferred the real estate to Defendant with actual intent to hinder, delay, or defraud one or more of his creditors, and/or without receiving a reasonably equivalent value and reasonably should have believed that he would incur debts beyond his ability to pay as they became due.”

Defendant admits that Plaintiff’s complaint mirrors the statutory language, but moves to dismiss on the grounds the complaint does not contain any specific facts or circumstances constituting fraud with the particularity required by Rule 7009(b). Plaintiff argues that the complaint has sufficiently pled fraudulent transfer and intent, and that Debtor’s Schedules provided the source of many of the facts averred in the Amended Complaint, which must be taken as true in deciding a motion to dismiss.

### **DISCUSSION**

Defendant’s motion to dismiss is based upon Rule 9(b), Fed. R. Civ. P., incorporated by reference in F.R.B.P. 7009, which states: “ In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.” *In re Daou Systems, Inc. Securities Litigation*, 397 F.3d 704, 710 (9<sup>th</sup> Cir. 2005). Thus by Rule 9(b)’s own terms, intent may be averred generally. *See Rieser v. Milford (In re Chari)*, 276 B.R. 206, 231 n. 4 (Bankr. S.D. Ohio 2002).

The Court begins by noting that Plaintiff’s Amended Complaint states claims for relief based on a specific federal statute, § 548(a)(1), and state fraudulent transfer statutes available to the Trustee under § 544. *In re Acequia, Inc.*, 34 F.3d 800, 804, 807 (9<sup>th</sup> Cir. 1994); *In re United Energy Corp.*, 944 F.2d 589, 593 (9<sup>th</sup> Cir. 1991). Defendant assumes without showing that Rule

9(b) applies at all to Plaintiff's claims for relief based on the provisions contained in the fraudulent transfer statutes. However, while the particularity requirements of Rule 9(b) apply to claims which are grounded in fraud, such as § 548(a)(1)(A) and § 31-2-333(1)(a), Rule 9(b) may not apply to Plaintiff's other claims not grounded in actual fraud, § 548(a)(1)(B) and § 31-2-331(b). *See Anderson v. Clow (In re Stac Electronics Sec. Litig.)*, 89 F.3d 1399, 1405 n. 2 (9th Cir.1996), *cert. denied*, 117 S.Ct. 1105 (1997); *see also Heilig-Meyers Co. v. Wachovia Bank, N.A. (In re Heilig-Meyers)*, 297 B.R. 46, 51, n. 2 (Bankr. E.D. Va. 2003); *compare Daou*, 397 F.3d at 710 ("It is well established that claims brought under [SEC] Rule 10b-5 and [17 C.F.R. § 10(b)] must meet the particularity requirements of Federal Rule of Civil Procedure 9(b)").

Rule 9(b) must be read in conjunction with Rule 8(a)(2), incorporated by reference in F.R.B.P. 7008, which requires only that the pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief". It is inappropriate to focus entirely on the Rule 9(b) requirement of particularity in pleading fraud without taking into account the general simplicity and flexibility contemplated by Rule 8(a)(2). *See* 5 Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1298 (1990). The Montana Supreme Court explained this balance as follows:

[T]he two rules must be read in conjunction with each other. It should be kept in mind that Rule 8(a) requests 'a short and plain statement of the claim' for relief[.] ... Thus, it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules[.] ...

The sufficiency of a particular pleading under Rule 9(b) depends upon a number of variables. For example, the degree of detail required often turns on the context in which the fraud is alleged to have occurred[.] ... Perhaps the most basic consideration in making a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to an

adverse party and enable him to prepare a responsive pleading." Wright & Miller, Federal Practice and Procedure: Civil § 1298, p. 406-07, 410, 415[.]

*State ex rel. State Compensation Mut. Ins. Fund v. Berg* (1996), 279 Mont. 161, 177, 927 P.2d 975, 984.

In addition, as one court noted:

A more liberal standard for pleading fraud with particularity is applied in bankruptcy cases. *See In re O.P.M. Leasing Services*, 35 B.R. 854, 862 (Bkrtcy.S.D.N.Y.1983), *rev'd in part on other grounds, In re O.P.M. Leasing Services*, 48 B.R. 824, (S.D.N.Y.1985). This less stringent standard is predicated upon the fact that it is often the trustee, a third party, who is pleading fraud based on second-hand information. *See id.*; *see also Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2nd Cir.1974); *In re Germain*, 144 F.Supp. 678, 683 (S.D.Cal.1956).

*Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen L.L.P.*, 175 F.Supp.2d 1180, 1201 (D. Ariz. 2001). *See also Davidson v. Twin City Bank (In re Hollis & Co.)* 83 B.R. 588, 590 (Bankr. E.D. Ark. 1988).

Some guidance of the particularity required for pleading fraud is given by the Ninth Circuit in *Stac Electronics*, 89 F.3d at 1404<sup>2</sup>:

With respect to scienter, we held that plaintiffs need only “say [ ][it] existed.” [*In re GlenFed, Inc. Sec. Litig.* 42 F.3d 1541, 1547 (9<sup>th</sup> Cir. 1994)(en banc)]. However, we went on to hold that plaintiffs “must aver with particularity the circumstances constituting the fraud.” *Id.* We explained that time, place and content allegations, while necessary, are insufficient by themselves to state a claim for fraud. *Id.* at 1547-48. “The plaintiff must set forth what is false or misleading about a statement, and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading.” *Id.* at 1548. Further, the statement or omission must be shown to have been false or misleading *when made*. *Id.* at 1548-49.

The Ninth Circuit explains the policy underlying Rule 9(b)’s particularity requirements as

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<sup>2</sup>The fraud alleged in *Stac Electronics* also arose under Section 10(b) of the Exchange Act of 1934 dealing with securities.

follows:

Rule 9(b) serves to give defendants adequate notice to allow them to defend against the charge and to deter the filing of complaints “as a pretext for the discovery of unknown wrongs,” to protect professionals from the harm that comes from being subject to fraud charges, and to “prohibit [ ] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9<sup>th</sup> Cir. 1985). Because the same policy considerations apply to Section 11 claims sounding in fraud, we hold that persons making such claims must state with particularity the circumstances constituting such fraud.

*Stac Electronics*, 89 F.3d at 1405.

Assuming Rule 9(b) applies to Plaintiff’s fraudulent transfer claims, paragraphs 9 through 13 of the Amended Complaint state the approximate time, place where the real estate allegedly fraudulently transferred is located, nature of the transfer, and states with particularity the circumstances constituting the fraudulent transfer. There are no “unknown wrongs” pleaded or for which discovery is sought in the Amended Complaint. Paragraph 14 of the Amended Complaint includes allegations mirroring the statutory language and elements of the federal fraudulent transfer statute under the Code, § 548(a)(1)(A) and (B). Paragraph 17 in Count Two recites the elements of a state law fraudulent transfer claim, § 31-2-333(1)(a) and (b)(ii); and several of the “badges of fraud” listed at § 31-2-333(2) for determining actual intent under § 31-2-333(a) are averred in the Amended Complaint in paragraphs 6 (insider), and 14 (reasonably equivalent value and insolvency).

Fraudulent intent may be established by circumstantial evidence, and only a single badge of fraud may stamp a transaction as fraudulent. *Montana Nat. Bank v. Michels* (1981), 193 Mont. 295, 300, 631 P.2d 1260, 1263. After considering the averments of Amended Complaint with the requirements and policy underlying Rule 9(b), this Court concludes that Plaintiff’s

Amended Complaint satisfies the requirements for particularity of Rule 9(b), if applicable.

Enough detail is provided in the Amended Complaint to give adequate notice to the Defendant and enable her to prepare a responsive pleading. *See, Stac Electronics*, 89 F.3d at 1405.

Furthermore, Defendant moves for dismissal of the adversary proceeding and did not move for a more definite statement under Fed. R. Civ. P. 12(e) (incorporated by reference in F.R.B.P. 7012(b)). By itself, Rule 9(b) does not authorize dismissal of an adversary proceeding for failure to plead with particularity, and Defendant does not specify on which rule she bases her motion to dismiss. The only applicable rule which could feasibly apply to Defendant's motion to dismiss at this stage of this proceeding is Fed. R. Civ. P. 12(b)(6) (incorporated by reference in F.R.B.P. 7012(b)), which authorizes a defense made by motion for failure to state a claim upon which relief can be granted. However, the standard under Rule 12(b)(6) is strict.

The Ninth Circuit explained in *Wright* that a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Wright v. Riveland*, 219 F.3d 905, 912 (9<sup>th</sup> Cir. 2000). In considering whether to dismiss Plaintiff's Amended Complaint the Court must take all allegations of material fact in the Amended Complaint as true and construe them in the light most favorable to the Plaintiff. *Daou*, 397 F.3d at 709-10; *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9<sup>th</sup> Cir. 2002). It is improper for the court to dismiss a complaint unless it appears certain that the plaintiff could prove no set of facts in support of his claims which would entitle him to relief. *Moyo v. Gomez*, 40 F.3d 982, 984 (9<sup>th</sup> Cir. 1994); *Baker v. McNeil Island Corrections Center*, 859 F.2d 124, 127 (9<sup>th</sup> Cir. 1988). Finally, dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment. *Daou*,

397 F.3d 710; *Gompper*, 298 F.3d 893, 895.

Applying this strict standard, taking all the allegations of the Amended Complaint, which Plaintiff admits mirror the federal and state fraudulent transfer statutes, as true and construing them in the light most favorable to the Plaintiff, the Court finds that the averments of the Amended Complaint are sufficient to survive dismissal. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9<sup>th</sup> Cir. 1998). The Amended Complaint contains all necessary particularity, and Defendant did not first seek amendment or move for a more definite statement.

**IT IS ORDERED** a separate Order shall be entered in conformity with the above, denying Defendant's motion to dismiss, filed February 7, 2005.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER  
U.S. Bankruptcy Judge  
United States Bankruptcy Court  
District of Montana